Moreover, it is well settled that a judgment in an action in which a government agency or officer represents private individuals is binding on those individuals. *Heckman v. United States*, 224 U.S. 413, 445-46, 32 S.Ct. 424, 56 L.Ed. 820 (1912). In fact, the Restatement (Second) of Judgments § 41(1) explains "that a person is considered to be represented by another party who is . . . 'an official or agency invested by law with authority to represent the person's interests.'" Here, the EEOC is an agency expressly invested by law with authority to represent the interests of individuals allegedly aggrieved by discriminatory practices.

By statute Congress expressly has empowered the EEOC to represent alleged aggrieved individuals in civil enforcement actions against employers and to recover monetary or "make-whole" relief for them. 29 U.S.C. § 626 and 29 U.S.C. § 216(c). Accordingly, by statute, when the EEOC initiates litigation to enforce an employee's rights under the ADEA, it becomes the individual's legal representative as a matter of law. Although the ADEA does not require that a previously filed action by an employee be dismissed automatically when the EEOC files suit on the individual's behalf, there is no question that under the distinctive enforcement scheme of the ADEA, a relationship of privity exists between the EEOC and alleged aggrieved individuals such that a lawsuit litigated by either the EEOC or the individual bars subsequent relitigation of the same claims or issues. *EEOC v. U.S. Steel Corp*, 921 F.2d at 493-94; *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300-1 (2nd Cir. 1988); *EEOC v. TIC – The Industry Company, et al.*, 2002 U.S. Dist. LEXIS 22728 *9 (E.D. La. 2002); *U.S. Steel* and *Bauman v. Jacob Suchard, Inc.*, 136 F.R.D. 460, 461 (N.D. Ill. 1990); *Mohammed v. May Department Stores*, 273 F.Supp.2d 531 (Del. 2003).

In *Victa* v. *Merle Norman Cosmetics, Inc.*, 19 Cal.App.4th 454, 24 Cal.Rptr.2d 117 (1993), the case on which Petitioners so heavily rely, the California state court properly recognized that privity may exist between the EEOC and those it represents. *Id.* at 468 ("This decision does not stem from or signify a general disavowal of the EEOC's capacity to stand in privity with a claimant in an ADEA case."). The *Victa* court's conclusion that the EEOC and Victa were not in privity "derive[d] from the particular facts of the case at hand, which in our view compel the conclusion reached." *Id.* Those facts were that in entering into a consent judgment with the defendant for injunctive relief only, without consideration of relief for the individual, the EEOC was not representing Victa's interests. In the Federal Suit, the EEOC represented Vines and McGraw through final judgment, filing two dispositive motions on its claims for "make-whole" relief on their behalf and vigorously opposing Respondents' dispositive motions.

Unlike *Victa*, where there was no consideration of or finding on the issue of discrimination, the issue of whether Vines and McGraw were discriminated against because of age has been definitively decided by a valid and binding federal court judgment after four years of litigation. The district court dismissed the EEOC's age discrimination claims on behalf of Vines and McGraw because it found **Respondents had legitimate, nondiscriminatory reasons for their employment decisions with regard to Vines and McGraw and there was no evidence to support the conclusion that age was a factor.** In light of the district court's specific findings, which were essential to the district court's judgment of dismissal with prejudice, the issue presented here is how can Vines and McGraw litigate their state court claims of age discrimination without violating the doctrine of collateral

estoppel? As the Fifth Circuit properly recognized, the answer is simple. They cannot.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED FILE
CIVIL ACTION NO. 3:97CV0873
(3:97CV1095)
3:98CV0010

[Filed July 18, 2001]

Dr. Dwight Vines and Dr. Van McGraw	)
	)
v.	)
	)
University of Louisiana at Monroe and	)
the Board of Supervisors of the University	)
of Louisiana System	)
	)
Consolidated with	)
	)
U.S. Equal Employment Opportunity	)
Commission	)
	)
v.	)
	)
The Board of Trustees of the University	)
of Louisiana System and the	)
University of Louisiana at Monroe	)
	)

JUDGE ROBERT G. JAMES
MAG. JUDGE KAREN L. HAYES

RULING

This case arises out of Plaintiff U.S. Equal Employment Opportunity Commission's ("EEOC") allegations of age discrimination against Defendants the University of Louisiana at Monroe ("ULM") and the Board of Supervisors of the University of Louisiana System ("the Board"). On May 11, 2001, Magistrate Judge Karen L. Hayes issued a Report and Recommendation [Doc. #246] on four motions. She recommended that this Court deny two motions filed by the EEOC: "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162] and a motion in limine to exclude certain of Defendants' defenses [Doc. #214]. Additionally, the Magistrate Judge recommended that this Court deny two defense motions: "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165] filed by ULM and a motion for summary judgment [Doc. #201] filed jointly by ULM and the Board.

Defendants timely objected to the Magistrate Judge's Report and Recommendation, and the EEOC timely responded to Defendants' objections. The EEOC did not file any objections regarding the Magistrate Judge's recommendations on its motions.

When a party files timely objections to a magistrate judge's report and recommendation, the district court conducts a de novo review of those portions of the report. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. Having conducted a de novo review of the Magistrate Judge's report, Defendants' objections, Plaintiff's responses, and the entire

record in this case, the Court adopts the Magistrate Judge's Report and Recommendation in part and declines to adopt it in part The Court ADOPTS the Magistrate Judge's Report and Recommendation denying (1) Plaintiff's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) Plaintiff's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and (3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165]. However, the Court DECLINES TO ADOPT the Magistrate Judge's Report and Recommendation denying Defendants' joint motion for summary judgment [Doc. #201] and, instead, GRANTS Defendants' motion for summary judgment.

Although not addressed by the Magistrate Judge in her Report and Recommendation, the Board raises an additional objection [Doc. #253], asserting that it is immune from suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, pursuant to the Supreme Court's decision in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S. Ct. 631, 647, 145 L. Ed.2d 522 (2000) and post-*Kimel* case law. Consistent with the previous rulings of the Court and the Magistrate Judge and with applicable case law, the Court OVERRULES this objection.

I. Eleventh Amendment Immunity

In its objection memorandum, the Board argues that *Kimel* bars the EEOC from seeking monetary damages against it, an agent of the State, under the Eleventh Amendment. *Kimel* prohibits employees and former employees from pursuing an ADEA action for monetary damages against the state in federal court. *See* 528 U.S. at 91. By analogy, the Board contends that the EEOC should not be permitted to seek monetary damages as a representative of former employees.

The EEOC responds that the Court and the Magistrate Judge have previously ruled on this issue and rejected the Board's argument and that its argument should be rejected once again.

In an earlier Report and Recommendation, the Magistrate Judge examined *Kimel* and recommended that the EEOC be permitted to proceed with this lawsuit. *See* March 23, 2000, Report and Recommendation. The Court adopted that recommendation. *See* May 26, 2000, Judgment (affirming the Report and Recommendation).[1] The Court again refers the parties to the Magistrate Judge's well-reasoned analysis. For additional clarification, the Court cites the parties to the post-*Kimel* decision of a federal district court in Massachusetts, which is consistent with the Court's earlier ruling and which succinctly explains why the Board's argument fails:

> The [Supreme] Court's decision in *Kimel* holds "only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." 528 U.S. at 91,120 S. Ct. 631. That is, because the ADEA is not legislation authorized by § 5 of the Fourteenth Amendment, a private litigant seeking money damages cannot defeat the State's Eleventh Amendment immunity. Although, as the Court states, "the ADEA is not 'appropriate

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[1] The Magistrate Judge's March 23, 2000, Report and Recommendation also recommended that the EEOC be permitted to present evidence of disparate impact liability at trial. In its May 26, 2000, Judgment, this Court affirmed her recommendation. However, in light of further briefing by the parties and the following decision of the Court that disparate impact is not a viable theory of recovery under the ADEA, the Court reverses its earlier ruling on this issue.

> legislation' under § 5 of the Fourteenth Amendment," *id.* at 82-83, 120 S.Ct. 631, *Kimel's* holding does not vitiate the Supreme Court's earlier decision in *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054, 75 L. Ed.2d 18 (1983), which held that the extension of the ADEA to cover State and local governments is a valid exercise of Congress' authority under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and rejected a challenge to the ADEA based on the Tenth Amendment. *See id.* at 235, 103 S.Ct. 1054.

State Police for Automatic Retirement Ass'n v. Difava, 138 F. Supp.2d 142, 145-46 (D. Mass. 2001). Further, the Supreme Court has repeatedly admonished "that a State's immunity under the Eleventh Amendment is inapplicable where a State is sued by the federal government, even for money damages. *Id.* at 146 *(citing Alden v. Maine,* 527 U.S. 706, 755, 119 S. Ct. 2240, 144 L. Ed.2d 636 (1999); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 49 n. 14, 116 S. Ct. 1114, 134 L. Ed.2d 252 (1996); *United States v. Texas,* 143 U.S. 621, 644-645, 12 S. Ct. 488, 36 L. Ed. 285 (1892)).

This Court finds that the Eleventh Amendment does not bar a lawsuit under the ADEA by an agency of the federal government, such as the EEOC, even when the agency seeks money damages. Accordingly, the Board's objection on Eleventh Amendment grounds [Doc. #253] is OVERRULED.

II. Disparate Impact Liability under the ADEA

The EEOC has alleged that Defendants' violated the ADEA by adopting and enforcing a policy that allegedly has

a disparate impact on persons in the protected age class,[2] Defendants object to the Magistrate Judge's recommendations on the disparate impact claims for two reasons: (1) because disparate impact is not a viable theory of liability under the ADEA and (2) because the EEOC has not produced the proper statistical evidence to support such a claim.

A. Viability of Disparate Impact as a Theory of Liability under the ADEA

In her Report and Recommendation, the Magistrate Judge found that the Court is "'constrained to recognize disparate impact liability under the ADEA'" because of the Fifth Circuit's ruling in *EEOC v. General Dynamic Corp.*, 999 F.2d 113 (5th Cir. 1993), that it was an abuse of discretion for a district court to exclude expert evidence on a disparate impact claim. *May 11, 2001, Report and Recommendation* ("*May 11, 2001, R & R*"), p. 6. While acknowledging the split among courts on the viability of disparate impact claims under the ADEA, the Magistrate Judge concluded, based on *General Dynamic* and the legislative history of the Act, that the Court must assume the availability of disparate impact and disparate treatment claims under the ADEA.

Defendants contend that the Magistrate Judge erred. They disagree with the Magistrate Judge's reliance on *General Dynamic*. The Fifth Circuit's ruling in that case was issued prior to the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), where Justice Kennedy questioned the viability of disparate impact liability under the

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[2] The Magistrate Judge has set forth the EEOC's specific allegations under this theory, and the Court will not re-state them here. *See* May 11, 2001, Report and Recommendation, pp. 1-2.

ADEA. Moreover, the Fifth Circuit emphasized that it "express[ed] no opinion as to the merits of the EEOC's disparate impact claim." *Id.* at 117 n.2 (emphasis added). Instead, Defendants would have the Court rely on more recent case law in this and other jurisdictions where the courts have either questioned or rejected the viability of disparate impact claims under the ADEA.

In further support, Defendants compare the ADEA to the Equal Pay Act ("EPA), 29 U.S.C. 206(d). The EPA prohibits employers from discriminating against employees on the basis of sex, but allows "a differential based on any factor other than sex," while the ADEA prohibits age discrimination, but allows "differentiation . . . based on reasonable factors other than age." *Cf.* 29 U.S.C. § 206(d)(1) to 29 U.S.C. § 623(f)(1). The Supreme Court previously held in *Washington v. Gunther,* 452 U.S. 161 (1981), that there is no disparate impact liability under the EPA, and, given its similar language, Defendants assert that this Court should find that there is no disparate impact liability under the ADEA.

Finally, Defendants argue that this Court should not recognize a disparate impact cause of action under the ADEA when Congress has not done so. Congress amended Title VII in 1991, adding a disparate impact cause of action, but did not amend the ADEA. Although Defendants contend that this alone is reason for the Court to refuse to recognize disparate impact liability, they also object to the Magistrate Judge's disregard of a recent Supreme Court decision, *Alexander v. Sandoval,* 121 S. Ct. 1511 (2001). Defendants contend that *Sandoval* stands for the proposition that no cause of action for disparate impact exists if Congress has not expressly authorized or written that cause of action into the governing statute.

The EEOC responds that the Magistrate Judge properly relied on the Fifth Circuit's implicit holding in *General Dynamic* to find that disparate impact is a viable theory of liability under the ADEA In its estimation, the dictum of three concurring and dissenting judges in the more recent *Rhodes* decision should not be given the weight of *General Dynamic*.

Further, the EEOC agrees with the Magistrate Judge that the Supreme Court's decision in *Sandoval* is irrelevant. In that case, the Supreme Court examined Title VI of the Civil Rights Act of 1964, which is not an employment statute and which does not provide a private cause of action *at all*. The EEOC argues that a private cause of action is available under the ADEA; the only question is under what legal theory.

Having considered the applicable case law, the arguments of the parties, and the analysis of the Magistrate Judge, the Court declines to adopt the Magistrate Judge's Report and Recommendation. The Court agrees with the Magistrate Judge that there is no clear precedent in the Fifth Circuit. Nevertheless, a review of the case law in this jurisdiction after Justice Kennedy's comments in *Hazen Paper* suggests that disparate impact is not a viable theory of liability under the ADEA. In a 1996 Fifth Circuit case, *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996), Circuit Judge DeMoss, joined by Circuit Judges Smith and Barksdale, wrote a partial concurrence and partial dissent and stated: "*Hazen Paper* indicates that disparate impact theory is not available under the ADEA." Another federal district court in this Circuit recently relied on *Rhodes* and *Hazen Paper* and declined to recognize disparate impact liability under the ADEA. *Camp v. Lockheed Martin Corp.*, 1998 U.S. Dist. Lexis 1692 (S.D. Tex. 1998). Although its decision has no precedential weight with this Court, a Louisiana appellate court decision also squarely held that "a disparate impact

theory of discrimination is not cognizable under the ADEA." *O'Boyle v. Louisiana Tech Univ.*, 741 So.2d 1289 (La. App. 2 Cir. 1999).

Significantly, since the parties filed their briefs in this case, the Eleventh Circuit Court of Appeals issued a decision holding that, as a matter of first impression, disparate impact claims may not be brought under the ADEA. *Adams v. Florida Power Corp.*, —F.3d—, 2001 WL 754477 (11th Cir. July 5, 2001). The Eleventh Circuit's decision is not binding on this Court, but its reasoning is persuasive. The Eleventh Circuit explained the significance ofthe Supreme Court's decision *in Hazen Paper* as follows:

> [W]hile the *Hazen* [*Paper*] Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot. First, the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.". . . In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, *such as pension status,* did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable . . . That position is inconsistent with the viability of disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

Id. at *3 (emphasis added) (citations omitted).

Additionally, while the Court agrees with the Magistrate Judge and the EEOC that *Sandoval* is irrelevant to this case, the Court also finds it persuasive that Congress amended Title VII in 1991 to specifically include a cause of action for disparate impact, but failed to amend the ADEA to do the same.

In light of these and other considerations well-briefed by the parties, the Court concludes that disparate impact is not a viable theory of recovery under the ADEA.

B. Analysis of EEOC's Disparate Impact Claims

Even if disparate impact were a viable theory of liability, the EEOC has not established such a claim. It is undisputed by the parties that the EEOC has identified a policy which allegedly creates a disparate impact on workers forty years of age or older. However, the parties dispute whether the EEOC has met its burden of demonstrating that the policy actually *has* a disparate impact.

The Magistrate Judge relied on the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), as providing the proper test for disparate impact claims: whether the policy affects members of the protected group more than it affects non-members. Based on the record evidence, she found that the challenged policy in this case appears to affect *only* members of the protected age class, and, thus, ruled that the EEOC had established a prima facie case.

Although Defendants raised legitimate business reasons for their actions, the Magistrate Judge found genuine issues for trial because the EEOC "challenge[d] the legitimacy and sufficiency of the defendants' justification, and argue[d] that

there were other means of achieving any legitimate purpose the defendants may have had which would not have a discriminatory effect." *May 11, 2001, R&R*, p. 13.

Defendants object to the Magistrate Judge's approach, contending that disparate impact analysis does not apply where the policy at issue affects, for a reason other than age, only a small subgroup of the prorated class. The EEOC cannot establish a prima facie case merely by stating that all members of the subgroup of Louisiana state retirees affected by the policy are forty years of age or older.

Rather, citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988), Defendants contend that the ADEA requires the EEOC to make a statistical comparison. The EEOC must compare the number of individuals in the protected group excluded by the policy and the number of individuals in the non-protected group and show that there is a "statistically significant" disparity between the two groups. Defendants argue that neither the EEOC nor the Magistrate Judge has cited any case where a prima facie case of disparate impact liability has been stated without any comparative statistical evidence offered.

The EEOC agrees with the Magistrate Judge that statistical proof in a disparate impact case need only show that a "challenged practice more harshly affects the protected group" and argues that it has met this requirement. According to the EEOC, it has established a prima facie case of disparate impact liability because the policy is directed at state retirees and all non-disabled state retirees (100%) are forty years of age or older. Singling out state retirees is simply a way for Defendants to target older workers.

The Court finds that, even if disparate impact is a viable theory of recovery under the ADEA, the EEOC has failed to meet its prima facie burden. While it is true that only persons in the protected age group are affected by the policy, they are affected because of their status as state retirees, not because of their age. Prevailing case law requires the EEOC to make *some comparison* to establish a "causal connection [between the policy and] . . . a class based imbalance in the work force." *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994) (quoting *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982)). However, the EEOC has made no attempt to show what overall effect the policy has on the protected age class of workers at ULM or within the Board system and, thus, has not shown any imbalance in the workforce. Indeed, as the Magistrate Judge noted, all persons in Vines and McGraw's department at ULM were over the age of forty.

Therefore, Defendants' motion for summary judgment is GRANTED as to the EEOC's disparate impact claims.

III. Disparate Treatment Liability under the ADEA

The EEOC also alleges that Defendants violated the ADEA under a disparate treatment theory. The Magistrate Judge employed the standard burden-shifting paradigm and determined that the EEOC raised genuine issues of material fact for trial. First, she found that the EEOC had established a prima facie case on behalf of Vines and McGraw. Both persons were in the protected age class, qualified for their positions, and subject to adverse actions (i.e., lower pay and non-renewal of their contracts). The Magistrate Judge was presented with no evidence that Vines and McGraw were replaced by younger persons. Instead, she relied on statements by Defendants' representative referring to the hiring of "new

people" with "fresh energy" and explaining that retired persons have "given up," have "had it," have a lower level of energy, and want "to have a quieter life" as evidence that actions were taken against Vines and McGraw because of their age.

Based on the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000), the Magistrate Judge ruled that these same statements were sufficient evidence to raise a genuine issue of fact for trial whether Defendants' reasons for their actions were pretext for discrimination.

Defendants contend (1) that the EEOC cannot establish its prima facie case by relying on stray remarks, (2) that they have produced legitimate, non-discriminatory reasons for not renewing Vines' and McGraw's contracts and paying them lower salaries, and (3) that the EEOC cannot produce sufficient evidence that those reasons were pretext for discrimination.

First, Defendants cite the Fifth Circuit's stringent requirement for stray remarks to serve as evidence of discrimination: the remarks must be (1) related to the protected class of persons of which the plaintiff is a member, (2) proximate in time to termination, (3) made by an individual with authority over the employment decision at issue, and (4) related to the employment decision at issue. *Auguster v. Vermillion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (citing *Krystek v. Univ. Of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999) (other citation omitted). The remarks in this case were made by James A. Callier ("Callier"), the former President of the Board. Callier, who, Defendants point out, is a member of the protected class himself, recommended the policy, but was not involved directly in the decisions to

terminate Vines or McGraw or to set their pay or teaching assignments. Defendants also point out that the statements were made in response to questioning by the EEOC during depositions taken years after the policy was adopted. Finally, Defendants contend that the statements were taken out of context to attribute age animus to innocuous words and clipped phrases.

Second, even if the EEOC met its prima facie burden, Defendants contend that they produced legitimate, non-discriminatory reasons for their actions. They argue that Vines and McGraw were paid commensurate with their duties as non-tenured faculty members and in accordance with La. Rev. Stat. § 11:707.[3] They further argue that the decision not to renew Vines' and McGraw's contracts was based on the

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[3] Although it has since been amended, at the time this lawsuit was brought, La. Rev. Stat. § 1 1:707 provided as follows:

> A. Any person on retirement under the Teachers' Retirement System of Louisiana may be employed during the periods of July first through June thirtieth of any year; provided that his earnings in such employment do not exceed fifty percent of his average final compensation for such period. . . .
>
> B. **Should any retiree earn more than fifty percent of his average final compensation** as adjusted under Subsection A during the twelve-month period, **his retirement benefits** in the following twelve months immediately after the retirement system receives the employer's report shall be reduced during the following twelve **month period so that the total reduction equals one-half of the amount earned in excess of fifty percent of his average final compensation for the twelve-month period covered by the report.**

(emphasis added).

Board's age-neutral policy against hiring state retirees on a full time, regular, and continuous basis.

Third, Defendants contend that the EEOC has not rebutted these reasons with any competent evidence. In fact, according to Defendants, the evidence shows that ULM continues to employ numerous faculty members the same age or older than Vines and McGraw. In addition, Defendants point out that Vines and McGraw could have avoided the earnings limitation in La. Rev. Stat. § 11:707 by suspending their retirement benefits during their reemployment, as provided under La. Rev. Stat. § 11:737.

The EEOC contends (1) that it has met its prima facie burden, (2) that the reasons produced by Defendants for the actions taken against Vines and McGraw were not legitimate or reasonable, and (3) that it has produced evidence, through the remarks of Defendants' designated representative, that Defendants' allegedly non-discriminatory reasons were pretext for discrimination.

First, the EEOC contends that it met its prima facie burden because Vines and McGraw are over the age of forty, qualified for their positions, their contracts were not renewed, and they were replaced with younger people.

Second, the EEOC contends that Defendants have not produced a reasonable factor other than age for their actions against Vines and McGraw. Although Defendants claim to discriminate only against state retirees, the EEOC finds nothing "reasonable" about this basis. The EEOC argues that there is no evidence that "double-dipping" (i.e., state retirees receiving full retirement benefits while returning to work and receiving a full salary from the state) was a problem because the Board approved the re-employment of 335 of 335 state

retirees when the universities asked to keep them. In addition, the EEOC argues that Defendants' reliance on state retiree status "by definition" targets older workers. Finally, the EEOC contends that La. Rev. Stat. 11:707, on which Defendants base their policy, does not impose an earnings limitation.

Third, the EEOC contends that the discriminatory remarks relied upon by the Magistrate Judge are sufficient evidence of pretext to withstand Defendants' summary judgment motion. Although Defendants characterize the statements as "stray remarks by a nondecisionmaker," the EEOC points out that Callier made the remarks at a Fed. 11. Civ. P. 30(b)(6) deposition; therefore, according to the EEOC, his statements were the statements *of the Board* and those of a decisionmaker. In addition, Callier and Carroll Falcon ("Falcon") were the two principals most directly involved in the development of the policy against re-hiring state retirees at full salary.

The Court finds that the EEOC has established a prima facie case of discrimination. Vines and McGraw were forty years of age, qualified to perform their jobs, did not have their contracts renewed, and were allegedly replaced by younger persons.[4]

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[4] Although this case has been on-going since 1997, the EEOC has presented evidence for the first time in responses to Defendants' objections to the Magistrate Judge's Report and Recommendation that Vines and McGraw were replaced by younger persons. Though this evidence was not presented to the Magistrate Judge, the Court will exercise its discretion and consider this argument and supporting evidence as well as those properly presented to the Magistrate Judge.

However, the Court finds that Defendants have presented legitimate, non-discriminatory reasons for paying lower salaries to and not renewing the contracts of Vines and McGraw, as set forth fully above. The Court further finds that the EEOC has not produced sufficient evidence to show that the reasons were pretext for age discrimination. As pointed out by Defendants, Vines and McGraw were re-appointed to non-tenured faculty positions and were teaching entry-level courses. They were no longer high-level administrators and could not expect to be paid as such. Further, whether or not the Board has approved the re-employment of state retirees under exceptions to its policy, there is no evidence that Vines' and McGraw's contracts were not renewed *because of their age*. Having reviewed Callier's deposition, the Court finds that his statements were taken out of context and further that they are not indicative of age animus. There is no evidence that Callier had any involvement in the decisions regarding Vines and McGraw. Thus, his comments are not the type of evidence sufficient to establish pretext.

Accordingly, Defendants' joint motion for summary judgment on the EEOC's disparate treatment claims is GRANTED.

IV. CONCLUSION

For the foregoing reasons, the Court adopts in part and declines to adopt in part the Report and Recommendation of the Magistrate Judge [Doc. #246]. The Court adopts the Magistrate Judge's Report and Recommendation and DENIES (1) the EEOC's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) the EEOC's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and

(3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165].

The Court also finds that the Board's separate objection [Doc. #253] that it is entitled to Eleventh Amendment immunity is OVERRULED.

Finally, the Court declines to adopt the Magistrate Judge's Report and Recommendation on Defendants' joint motion for summary judgment [Doc. #201]. Defendants' joint motion for summary judgment is GRANTED, and this case is DISMISSED WITH PREJUDICE.

MONROE, LOUISIANA this 18 day of July, 2001.

/s/_____
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED FILE
CIVIL ACTION NO. 3:97CV0873
(3:97CV1095)
3:98CV0010

[Filed July 18, 2001]

Dr. Dwight Vines and Dr. Van McGraw	)
	)
v.	)
	)
University of Louisiana at Monroe and	)
the Board of Supervisors of the University	)
of Louisiana System	)
	)
Consolidated with	)
	)
U.S. Equal Employment Opportunity	)
Commission	)
	)
v.	)
	)
The Board of Trustees of the University	)
of Louisiana System and the	)
University of Louisiana at Monroe	)
	)

JUDGE ROBERT G. JAMES
MAG. JUDGE KAREN L. HAYES

JUDGMENT

For the reasons set forth in this Court's ruling:

The Court adopts in part and declines to adopt in part the Report and Recommendation of the Magistrate Judge [Doc. #246].

The Court adopts the Magistrate Judge's Report and Recommendation and, IT IS HEREBY ORDERED THAT (1) the EEOC's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) the EEOC's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and (3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165] are DENIED.

IT IS FURTHER ORDERED that the Board's separate objection [Doc. #253] that it is entitled to Eleventh Amendment immunity is OVERRULED.

Finally, the Court declines to adopt the Magistrate Judge's Report and Recommendation on Defendants' joint motion for summary judgment [Doc. #201]. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' joint motion for summary judgment is GRANTED, and this case is DISMISSED WITH PREJUDICE, each party to bear its own costs.

MONROE, LOUISIANA this 18 day of July, 2001.

/s/_____
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

(3)

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SUPREME COURT, U.S.

No. 04-1615

IN THE

Supreme Court of the United States

DWIGHT VINES and VAN McGRAW,

Petitioners,

v.

UNIVERSITY OF LOUISIANA AT MONROE and BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Corrections to Respondents' Statement of Case Clarification of the Record 1

Reasons for Granting Petitioners' Request 6

The Fifth Circuit Erred in Deciding this Case 7

Conclusion 10

Appendix 1a

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Anderson v. City of Bessemer, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) 7

Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958 (5th Cir. 1968) 7

Atlantic Coast Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970) 5

Burns v. Equitable Life Assurance Society of the United States, 696 F.2d 21 (2d Cir. 1982) 6

Concerned Women for America v. Lafayette County, 883 F.2d 32 (5th Cir. 1989) 7

Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982) 6

EEOC v. Pemco Aeroplex, 383 F.3d 1280 (11th Cir. 2004) 7

General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318, 100 S. Ct. 1698 (1980) ... 9

Kimel v. Florida Board of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000) 2, 9

Cited Authorities

Page

Merle Norman Cosmetics, Inc. v. Victa, 936 F.2d 466 (9th Cir. 1991) 6

Mitchum v. Foster,407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) 5

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 474 U.S. 518, 106 S. Ct. 768, 33 L. Ed. 2d 552 (1986) 5

Riddle v. Cerro Wire and Cable Group, Inc., 902 F.2d 918 (11th Cir. 1990) 6

Smith v. City of Jackson, No. 03-1160, __ U.S. __, __ S. Ct. __ (03/30/2005) 9

United States v. United States Gypsum Company, 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed. 746 (1948) ... 7

Victa v. Merle Norman Cosmetics, Inc., 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117 (1993) 9-10

FEDERAL STATUTES

29 U.S.C. § 626(c)(1) 4, 9

STATE STATUTES

La. R.S. 11:707(A) 1

CORRECTIONS TO RESPONDENTS' STATEMENT OF CASE CLARIFICATION OF THE RECORD

On page 2 of Respondents' Opposition, by placing the word retiring in quotes, Respondents seek to cast the Petitioners in a negative light by implying that their actions in retiring from their administrative positions and returning to teach at the University of Louisiana at Monroe (ULM) was improper. This practice is allowed and specifically contemplated under the state laws governing the Teachers Retirement System of Louisiana (TRSL). Incorrectly, Respondents call it "double-dipping," a term for which they offer no evidence. Clearly the Petitioners were not "double-dipping" since they were earning a salary for the work they were doing teaching classes and they were properly collecting benefits from the TRSL pension plan into which they had paid and which system was patently aware of their new positions with ULM.[1] There is no evidence offered by the Respondents that taxpayers criticized this occurrence either generally or specifically. La. R.S. 11:707(A) did not limit the compensation to be paid retirees returning to employment, but only provided for the repayment of a limited amount of benefits if a salary exceeded a certain total. In fact, since the institution of the Board policy, the State of Louisiana implicitly endorsed the return of state retirees to employment by repealing the latter provision directing a partial repayment of benefits. The Petitioners' return to the classroom was not something that they arranged on their own, as Respondents imply, but was approved by ULM and which benefitted the State of Louisiana by returning highly qualified professors to the classroom upon the cessation of their administrative jobs.

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1. Despite the Respondents' claim, their pension benefits were not equal to their pre-retirement salary, but rather involved a formula based upon the prior three years of service. Further, their pension benefits are not untaxed, as Respondents claim, but in fact are subject to federal income tax.

Respondents at the top of page 3 claim that the Petitioners' state claims of age discrimination are time-barred. Once again, Respondents skew the truth. Prior to dismissing Petitioners' ADEA causes of action in the federal suit based upon *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), the U.S. District Court granted Respondents' motion to dismiss Petitioners' state law age discrimination claims on the basis of prescription. However, because the Petitioners at the time still had their ADEA claims pending, they could not immediately appeal the U.S. District Court's ruling, which Petitioners steadfastly and vehemently contend is incorrect based upon Louisiana law and Louisiana antidiscrimination statutes. There has been no appellate review of this ruling because the U.S. District Court remanded the matter to the Louisiana state court. The U.S. District Court vacated its ruling because it lacked jurisdiction over the Petitioners' state age discrimination claims since the Petitioners had no personal claims under the ADEA. Therefore, the U.S. District Court remanded the Petitioners' state lawsuit to the Louisiana Court. The Louisiana courts have never issued any ruling pertaining to the timeliness of the Petitioners' state age discrimination lawsuit.

Other prevarications are contained in the next paragraph on page 3. Respondents claim, "Petitioners took no action on their state law age discrimination claims in the State Suit following remand. Instead they actively assisted the EEOC in the prosecution of the ADEA claims in the Federal Suit on their behalf." A recitation of events demonstrates this falsehood. On June 1, 2000, the Federal Court remanded the state lawsuit. On December 5, 2000, Petitioners served the second set of Interrogatories and Requests for Production of Documents to Respondents. On January 17, 2001, Petitioners served another set of Interrogatories and Requests for Production of Documents on Respondents. Petitioners, represented by their private counsel, were deposed for a second time on January 26, 2001.

Respondents conducted these depositions for both the lawsuit by the EEOC and Petitioners' state lawsuit. After receiving responses from Respondents, Petitioners proposed deposition dates to Respondents for several witnesses who worked for Respondent ULM. The scheduling of these depositions was hindered by the preexisting trial dates for the EEOC's Federal lawsuit against the Respondents. Respondents then received a decision in their Federal case against the EEOC on July 18, 2001, which they proceeded to use against the Petitioners in the Louisiana State Court by filing a peremptory exception of *res judicata* and/or collateral estoppel in mid-October 2001. From this point forward, Respondents refused to participate in any further discovery until the Louisiana state court resolved the Respondents' pending peremptory exception of *res judicata* and/or collateral estoppel.

Respondents make additional false assertions on page 3 for which they offer absolutely no evidence. Petitioners did not solicit class members for the EEOC's expansion of its Federal lawsuit, nor was it within their control to increase or decrease the scope of the EEOC's lawsuit. This function always remained within the purview of the EEOC. Petitioners participated in the EEOC suit to the extent that they were required to do so as Charging Parties. Respondents also are disingenuous by stating that the EEOC articulated the attorney client privilege ". . . on behalf of Vines and McGraw." In fact the EEOC claimed this privilege for its own benefit so as to not have to divulge to Respondents certain information which it had required Petitioners to give to the agency.

On page 4 of their opposition, Respondents cast aspersions on Petitioners for not having included the decision of the Federal Court in the EEOC case against Respondents. Petitioners did not do so because this judgment's validity and correctness are not germane to the inquiry herein. Rather, the issue of privity as it applies to collateral estoppel is the focus. Respondents then proceed to quote a lengthy passage from this decision to attempt

to sway this Court by denigrating Petitioners' claims. Petitioners point to the fact that the Magistrate Judge assigned to the EEOC's case against Respondents completed a Report and Recommendation on the cross Motions for Summary Judgment by Respondents and the EEOC in which she recommended against granting summary judgment in favor of either the Respondents or the EEOC. By contrast, she determined that there were sufficient issues of material fact that Respondents discriminated against Petitioners on the basis of age to deny Respondents' Motion for Summary Judgment. She further determined that there were sufficient issues of material fact for trial concerning the disparate impact of Respondents' policy against employing state retirees. This decision is included herein in Petitioners' appendix to this brief.

The EEOC always maintained full control over the prosecution of the EEOC's case against Respondents. Petitioners have not had any effect on the manner in which the EEOC proceeded against Respondents. Petitioners did not wield any power over the conduct of the litigation. Clearly, when the EEOC abandoned its appeal of the original U.S. District Court decision, Petitioners did not have any command over the agency because Petitioners desired review of what they considered to be an incorrect decision. Because of the potential for Charging Parties' interests to diverge from that of the EEOC, Congress allowed individuals to sue privately under the ADEA pursuant to 29 U.S.C. § 626(c)(1). Petitioners availed themselves of this right and filed their lawsuits in state and federal court months before the EEOC initiated its litigation. Early on, Petitioners thereby articulated their desire to control their litigation and not have the EEOC represent them with respect to their age discrimination claims, in particular, those under Louisiana state law.

Respondents on page 5 claim that Petitioners state in the issues that the "Louisiana courts have definitively determined

that res judicata and collateral estoppel do not bar their effort to relitigate in the State Suit the same issues already decided against them in the Federal Suit." A clear reading of Petitioners' statement of the issues demonstrates that Petitioners are not contending that the Louisiana courts have issued a final judgment on the Respondents' peremptory exception of res judicata/collateral estoppel. Rather, Petitioners point out that the Louisiana courts properly utilized Federal jurisprudence in resolving the issues of res judicata and collateral estoppel. Further, the case cited by Respondents, *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), 474 U.S. 518, 106 S. Ct. 768, 33 L. Ed. 2d 552 (1986), is the beginning of the inquiry concerning a State Court judgment, not the end. As this Court explained in *Parsons Steel*, if a state court's decision is a final judgment under that state's law, then an injunction is prohibited under the relitigation exception to the Anti-Injunction Act. However, the issuance of an injunction is not mandated. The Federal Court must give further consideration to the questions of federalism, equity and comity in line with *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) and *Atlantic Coast Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1758, 26 L. Ed. 2d 234, 243 (1970). It is within the discretion of the U.S. District Court to reject issuing an injunction, as the U.S. District Court did herein. The Fifth Circuit exceeded the scope of appropriate review in overturning the U.S. District Court's decision to deny the injunction.

In the section entitled "Vines' and McGraw's Asserted Claim," Respondents misapprehend the import of the significance that Congress only authorized the EEOC to represent a charging party with respect to causes of action under the ADEA, not the respective state antidiscrimination statutes. Regarding the concept of privity, any representative authority with which the EEOC is vested from Congress cannot extend to individual charging parties' claims under state law. The

existence of privity is an essential element of collateral estoppel as well as res judicata. The sequence of the filing of the lawsuits signifies that Petitioners have manifested that the EEOC is not their representative concerning their state law claims.

REASONS FOR GRANTING PETITIONERS' REQUEST

Respondents misstate the crux of the problem with the U.S. Fifth Circuit's decision finding that collateral estoppel can be used to bar Petitioners' state lawsuit by applying the Respondents' judgment against the EEOC to Petitioners. The question is not whether ". . . the issues presented in the State Suit are precisely the same as the issues decided in the Federal Suit . . . ," as the Respondents claim in paragraph 2 on page 7. Privity remains an element of finding collateral estoppel, just as it is in res judicata because of due process concerns. The Fifth Circuit's decision herein creates a conflict in the circuit courts of appeal focusing on the resolution of the privity issue. The Second Circuit in *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), determined that a private litigant's lawsuit could not be eliminated through the actions of the Secretary of Labor, the predecessor to the EEOC charged with enforcing the ADEA, in settling and dismissing claims, including that of the individual. Similarly, in *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), the Second Circuit refused to bar an woman from pursuing a lawsuit that she had filed prior to the filing of the Federal government's ADEA lawsuit, even though she was a named party and the Federal government concluded the Federal lawsuit with a consent decree. When the defendant employer in *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466 (9th Cir. 1991) sought an injunction under the relitigation exception to the Anti-Injunction Act, the Ninth Circuit affirmed the District Court's denial of the injunction which it found to be within the District Court's discretion. The Eleventh Circuit in *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990)

noted that the interests of a private litigant and the EEOC can diverge, and when that occurs, privity does not exist. Therefore, an individual must be allowed to maintain his own action distinct from that of the EEOC. Recently in dictum in *EEOC v. Pemco Aeroplex*, 383 F.3d 1280 (11th Cir. 2004), the Eleventh Circuit reiterated its position on the issue of privity. Respondents did not refute that there is a conflict within the circuits caused by the Fifth Circuit's decision herein.

In addition, Petitioners have demonstrated that the U.S. Fifth Circuit utilized the incorrect standard of review. While the Fifth Circuit determined that it would review *de novo* the U.S. District Court's denial of the injunction under the relitigation exception to the Anti-Injunction Act, the Fifth Circuit incorrectly also subjected the District Court's factual findings to *de novo* review rather than evaluating these findings for clear error, as the Fifth Circuit previously had held in *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968) and *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989). As this Court has emphasized, the reviewing court cannot supplant its view of the facts for that of the lower court if the lower court's findings of fact are plausible, even if the appellate court would have decided the matter differently. If both sets of findings of fact are feasible or credible, then the lower court's rendering of the facts cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) and *United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed 746 (1948).

THE FIFTH CIRCUIT ERRED IN DECIDING THIS CASE

In attempting to justify a finding of privity between the EEOC and Petitioners, Respondents are trying to penalize Petitioners for participating in the EEOC case as Charging Parties. The effect of Respondents' position would be to diminish

the ability of the EEOC to investigate and prosecute its cases of discrimination because charging parties would be punished in losing their right to individually prosecute their own claims of discrimination. By first filing their private lawsuits, Petitioners already had established that they wanted to prosecute their own claims. Respondents state that Petitioners filed affidavits in connection with the EEOC's opposition to Respondents' Motion for Summary Judgment and in favor of the EEOC's own motion. They sat in on the presentation of depositions. What petitioners did was what the EEOC should expect and receive from charging parties in the prosecution of a case in order to ferret out instances of discrimination. When the EEOC sought to expand the scope of its lawsuit, Petitioners did not solicit class members for the lawsuit. At the most critical juncture in the maintenance of the EEOC's lawsuit, Petitioners did not have any control in the EEOC's handling of its appeal of the granting of Respondents' Motion for Summary Judgment dismissing the EEOC's suit. Petitioners already had established by filing their lawsuit that they wanted to prosecute their own claims within their own suit.

Petitioners fiercely refute Respondents' contention on page 8 that "The EEOC vigorously represented Vines and McGraw in the Federal Suit." The EEOC's total abandonment of the briefing of the appeal of the original decision discredits this assertion by Respondents. The original Report and Recommendation by the Magistrate Judge recognized that there were material issues of fact concerning whether there was disparate treatment on the basis of age when Dr. Vines and Dr. McGraw were terminated. (Pet. App. at 1a.) In addition, the Magistrate Judge found that there were sufficient issues of material fact regarding whether Respondents' policy against the hiring of state retirees had a disparate impact on those over the age of 40. The District Judge rejected this report and recommendation and also concluded that the disparate impact theory was not viable under the ADEA. This Court specifically